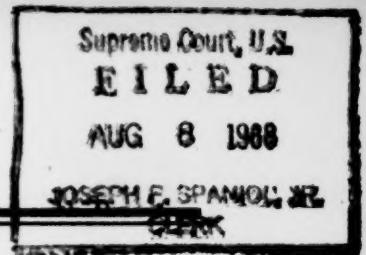


(3)
No. 88-30



IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE HORN & HARDART COMPANY,
Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

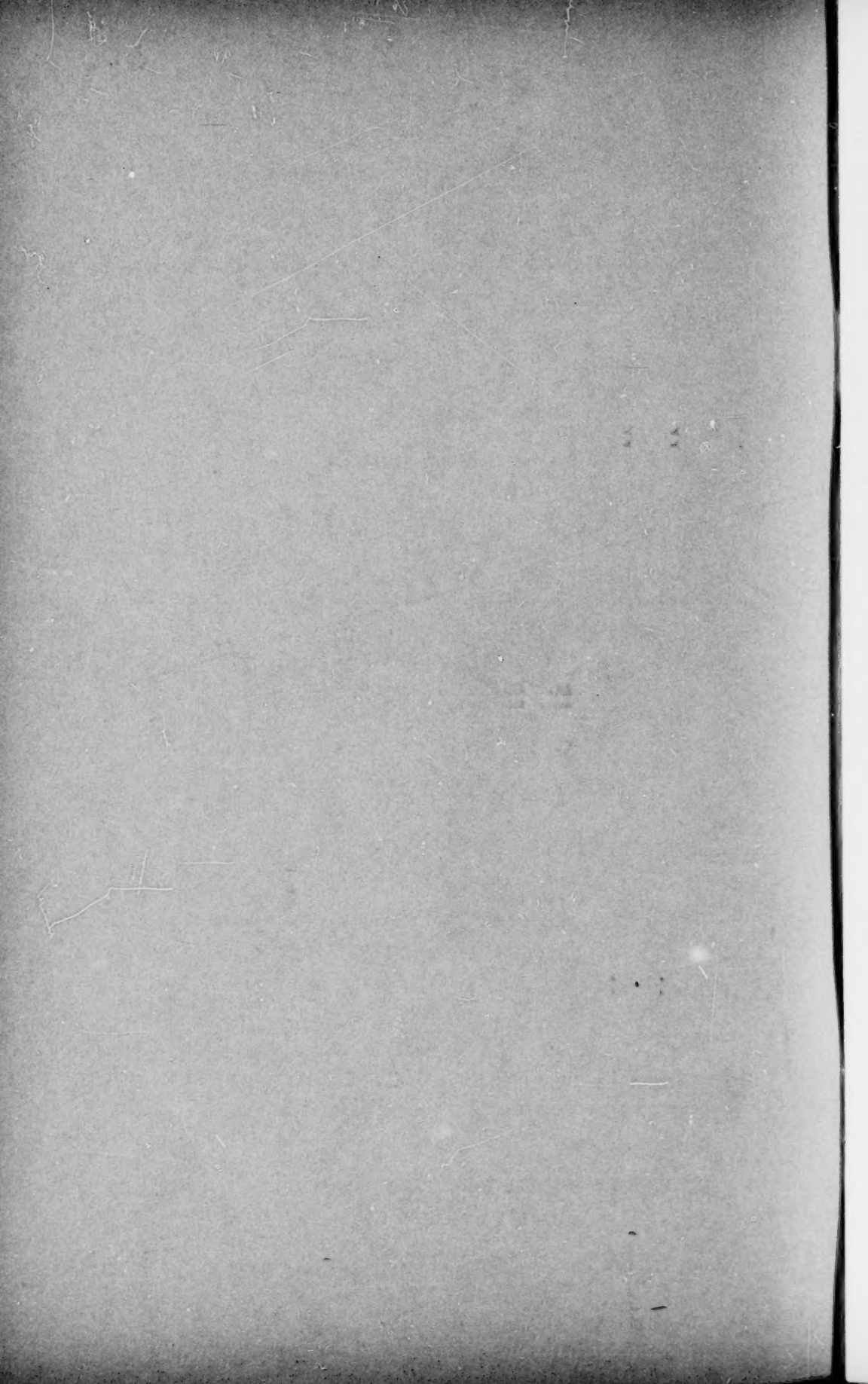
RESPONDENT'S BRIEF IN OPPOSITION

CHARLES F. LETTOW *
MATTHEW D. SLATER
MICHAEL J. SUSSMAN
CLEARY, GOTTlieb,
STEEN & HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700

* Counsel of Record

Counsel for Respondent

August 8, 1988



QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly concluded that a prior appeal upholding a declaratory judgment did not prevent the District Court from exercising jurisdiction over a motion for further relief filed by defendant-respondent under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, based on that declaratory judgment?

2. Whether the Court of Appeals correctly concluded that the relief granted by the District Court constitutes proper "further relief" within the meaning of 28 U.S.C. § 2202?

3. Whether the Court of Appeals correctly determined that further relief was not barred by the doctrine of res judicata?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are set forth in the petition for writ of certiorari in this case. Pursuant to S. Ct. Rule 28.1, respondent states that it has no publicly-owned parents, subsidiaries, or affiliates.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
I. The District Court Properly Exercised Jurisdiction	6
II. Relief Was Properly Granted Under 28 U.S.C. § 2202	11
III. The Doctrine of Res Judicata Does Not Bar Amtrak's Claims	15
CONCLUSION	21
Appendix of Excerpts from the Restatement (Second) of Judgments	1a

TABLE OF AUTHORITIES

Cases:	Page
<i>Aetna Casualty & Surety Co. v. Quarles</i> , 92 F.2d 321 (4th Cir. 1937)	15
<i>Aetna Life Insurance Co. v. Haworth</i> , 300 U.S. 227 (1937)	10
<i>Alexander & Alexander, Inc. v. Van Impe</i> , 787 F.2d 163 (3d Cir. 1986)	12
<i>Banco Nacional de Cuba v. Farr</i> , 383 F.2d 166 (2d Cir. 1967), <i>cert. denied</i> , 390 U.S. 956 (1968)	8
<i>Bankers Trust Co. v. Bethlehem Steel Corp.</i> , 761 F.2d 943 (3d Cir. 1985)	8
<i>Besler v. U.S. Department of Agriculture</i> , 639 F.2d 453 (8th Cir. 1981)	11
<i>Briggs v. Pennsylvania Railroad Co.</i> , 334 U.S. 304 (1948)	7
<i>Central States, Southeast & Southwest Areas Pension Fund v. Commercial Cartage Co.</i> , No. 86C 3268, slip op. (N.D. Ill. Apr. 24, 1987)	17
<i>County Fuel Co. v. Equitable Bank Corp.</i> , 832 F.2d 290 (4th Cir. 1987)	16, 17
<i>County of Cook v. Midcon Corp.</i> , 773 F.2d 892 (7th Cir. 1985)	17
<i>Doe v. Gallinot</i> , 687 F.2d 1017 (9th Cir. 1981)	14
<i>Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.</i> , 255 F.2d 518 (2d Cir. 1958), <i>cert. denied</i> , 358 U.S. 831 (1958)	6, 12, 13
<i>Griggs v. Provident Consumer Discount Co.</i> , 459 U.S. 56 (1982)	7
<i>Henry v. Farmer City State Bank</i> , 808 F.2d 1228 (7th Cir. 1986)	8, 9, 17
<i>Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc.</i> , 575 F.2d 530 (5th Cir. 1978)	19
<i>Kyle Engineering Co. v. Kleppe</i> , 600 F.2d 226 (9th Cir. 1979)	9
<i>Lawhorn v. Atlantic Refining Co.</i> , 299 F.2d 353 (5th Cir. 1962)	17, 20
<i>Martino v. McDonald's System, Inc.</i> , 598 F.2d 1079 (7th Cir.), <i>cert. denied</i> , 444 U.S. 966 (1979)	17
<i>McCann v. Kerner</i> , 436 F.2d 1342 (7th Cir. 1971) (per curiam)	12

TABLE OF AUTHORITIES—Continued

	Page
<i>McNally v. American States Ins. Co.</i> , 339 F.2d 186 (6th Cir. 1964)	10
<i>Montana v. United States</i> , 440 U.S. 147 (1979)	19
<i>National Railroad Passenger Corp. v. The Horn & Hardart Co.</i> , L and T Index Nos. 36876/85, 36877/85, 36878/85 (N.Y. Civ. Ct., part 52) (consolidated)	4
<i>National Research Bureau, Inc. v. Bartholomew</i> , 482 F.2d 386 (3d Cir. 1973)	9
<i>National Union Fire Ins. Co. of Pittsburgh, PA v. Jett</i> , 118 F.R.D. 336 (S.D.N.Y. 1988)	17, 20
<i>Oklahoma Alcoholic Beverage Control Bd. v. Cen- tral Liquor Co.</i> , 421 P.2d 244 (Okla. 1966)	14
<i>Overnite Transportation Co. v. Chicago Industrial Tire Co.</i> , 697 F.2d 789 (7th Cir. 1983)	9
<i>Potter v. Carvel Stores of New York, Inc.</i> , 203 F. Supp. 462 (D. Md. 1962), <i>aff'd</i> , 314 F.2d 45 (4th Cir. 1963)	17
<i>Powell v. McCormack</i> , 395 U.S. 486 (1969)	12
<i>Quern v. Jordan</i> , 440 U.S. 332 (1979)	8
<i>Rincon Band of Mission Indians v. Harris</i> , 618 F.2d 569 (9th Cir. 1980)	10, 14
<i>Rudell v. Comprehensive Accounting Corp.</i> , 802 F.2d 926 (7th Cir. 1986), <i>cert. denied</i> , 107 S. Ct. 1351 (1987)	17
<i>Sakezzie v. Utah State Indian Affairs Comm'n</i> , 215 F. Supp. 12 (D. Utah 1963)	12
<i>Skelly Oil Co. v. Phillips Petroleum Co.</i> , 339 U.S. 667 (1950)	10
<i>Sprague v. Ticonic National Bank</i> , 307 U.S. 161 (1939)	9
<i>Stephenson v. Equitable Life Assur. Soc'y</i> , 92 F.2d 406 (4th Cir. 1937)	15
<i>Switzer Brothers, Inc. v. Chicago Cardboard Co.</i> , 252 F.2d 407 (7th Cir. 1958)	9
<i>Teas v. Twentieth Century-Fox Film Corp.</i> , 413 F.2d 1263 (5th Cir. 1969)	14
<i>United States v. Snider</i> , 779 F.2d 1151 (6th Cir. 1985)	17

TABLE OF AUTHORITIES—Continued

Page

<i>United States v. Thompson</i> , 262 F. Supp. 340 (S.D. Tex. 1966)	17
<i>Windmoller v. Laguerre</i> , 284 F. Supp. 563 (D.D.C. 1968)	10

Statutes and Rules:

28 U.S.C. § 1254 (1)	2
28 U.S.C. § 1332 (a) (1)	2, 7, 10
28 U.S.C. § 2201	2, 10, 11
28 U.S.C. § 2202	<i>passim</i>
45 U.S.C. § 546 (m)	7
Fed. R. Civ. P. 7 (a)	16
Fed. R. Civ. P. 13 (a)	16, 17, 18
Fed. R. Civ. P. 12 (a)	18
Fed. R. Civ. P. 12 (b) (6)	18
Fed. R. Civ. P. 54 (c)	13

Miscellaneous:

E. Borchard, <i>Declaratory Judgments</i> 438-41 (2d ed. 1941)	12
H. Rep. 1264, 73d Cong., 2d Sess. 2 (1934)	15
<i>Restatement (Second) of Judgments</i>	16, 19, 20
<i>Restatement (Second) of Judgments</i> § 21	20
<i>Restatement (Second) of Judgments</i> § 22	5, 16, 18, 19
<i>Restatement (Second) of Judgments</i> § 22 (2) (b)	17
<i>Restatement (Second) of Judgments</i> § 22 comments a, b, d	20
<i>Restatement (Second) of Judgments</i> § 33	5
<i>Restatement (Second) of Judgments</i> § 33 comment. c (1982)	18
C. Wright, A. Miller & E. Cooper, <i>Federal Practice and Procedure</i> (1981)	19

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 88-30

THE HORN & HARDART COMPANY,
Petitioner,
v.

NATIONAL RAILROAD PASSENGER CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent National Railroad Passenger Corporation ("Amtrak") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this case. That court's opinion is reported at 843 F.2d 546.

OPINIONS BELOW

Citations to the opinions below are set forth in the Petition.

JURISDICTION

Discretionary jurisdiction of this Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit (the "Court of Appeals") entered on April 8, 1988, rests on 28 U.S.C. § 1254(1).

Petitioner, The Horn & Hardart Company ("Horn & Hardart"), commenced this action in the United States District Court for the District of Columbia (the "District Court"), on the basis of federal diversity jurisdiction, 28 U.S.C. § 1332(a)(1); diversity of the parties has continued to this day. Horn & Hardart sought a declaratory judgment, but the District Court granted summary judgment in favor of defendant Amtrak on May 30, 1985. Pet. App. 50a. On June 17, 1986, that decision was affirmed on appeal by the Court of Appeals. Pet. App. 37a; 793 F.2d 356. Thereafter on April 23, 1987, in accord with 28 U.S.C. § 2202, authorizing the grant of "necessary or proper" further relief based on a prior declaratory judgment issued under 28 U.S.C. § 2201, the District Court granted a petition by Amtrak for further relief. Pet. App. 12a; 659 F. Supp. 1258. It is the Court of Appeals' affirmance of that judgment (Pet. App. 1a; 843 F.2d 546), which is the subject of the Petition.

STATUTES

Pertinent statutes are contained in the Petition.

STATEMENT OF THE CASE

This case concerns a leasing dispute which was brought before the District Court by Horn & Hardart on the basis of diversity jurisdiction. The ensuing judgments in Amtrak's favor enforced the lease terms, with the Court of Appeals agreeing with the District Court that "none of Horn & Hardart's procedural or substantive arguments will permit that corporation to escape its contractual liability to Amtrak." Pet. App. 10a; 843 F.2d 550.

The three negotiated leases enforced by the District Court were entered into on June 1, 1980, by Horn & Hardart and Amtrak for restaurant and cocktail-lounge space in Amtrak's Pennsylvania Station in New York City. Each of the leases contained a Notice of Termination Clause that gave Amtrak the right to terminate the lease on ninety days' notice "in the event that [Amtrak] shall require the demised premises for its Corporate purposes." Pet. App. 38a; 793 F.2d 356-57. One lease included a cancellation-premium clause requiring Amtrak to reimburse Horn & Hardart up to \$300,000 in the event of early termination of the lease. Pet. App. 46a; 793 F.2d 360. In addition, each of the leases contained identical End-of-Term Holdover clauses providing for liquidated damages, measured as triple rent, Pet. App. 2a n.2; 843 F.2d 547 n.2; and identical provisions for the payment by Horn & Hardart of costs and expenses, including attorneys' fees, incurred by Amtrak due to a "default in the observance or performance of any term or covenant on [Horn & Hardart's] part." *Id.*

On November 29, 1984, Amtrak sent Horn & Hardart timely ninety-day notices of termination for all three leases. Pet. App. 51a. Amtrak intended to use the premises for a new ticket facility and expanded waiting room areas, as part of an overall redevelopment plan for the station. Pet. App. 51a-52a. The construction schedule for implementing the plan was dependent upon the availability of these spaces. Pet. App. 30a; 659 F. Supp. 1267; Pet. App. 51a.

Horn & Hardart refused to vacate the premises as required on February 28, 1985. Instead, on March 12, 1985, nearly four months after it was notified of the termination of its leases, Horn & Hardart instituted this action—based on diversity of citizenship and the Declaratory Judgment Act—seeking a declaration that the terminations were unlawful and violated the lease provisions,

as well as an injunction and \$2.5 million in damages. Pet. App. 3a; 843 F.2d 547. Amtrak promptly responded with a Motion to Dismiss or, in the Alternative, for Summary Judgment.

The District Court found that Amtrak had the legal right to terminate the leases "[b]ased on the plain language of the leases." Pet. App. 58a. The Court of Appeals affirmed, concluding that the District Court's "interpretation of the language, based upon its plain meaning, is unimpeachable." Pet. App. 44a; 793 F.2d at 359.¹

On August 19, 1986, shortly after the Court of Appeals' affirmance of the District Court's decision,² Amtrak filed a Motion for Further Relief, pursuant to 28 U.S.C. § 2202. Pet. App. 3a; 843 F.2d 547. Based on the determination by the District Court and the Court of Appeals that the leases were properly terminated, Amtrak sought to enforce the liquidated damages-for-holdover and cost-on-default provisions of the leases. Horn & Hardart responded with a "Motion to Dismiss Defendant's Motion for Further Relief." Pet. App. 14a; 659 F. Supp. 1260. The District Court granted Amtrak's Motion for Further Relief and denied Horn & Hardart's responsive Motion

¹ As of the District Court's ruling on May 30, 1985, Horn & Hardart had not yet vacated the premises, and in consequence Amtrak had brought and pursued three actions in New York courts to obtain possession. Pet. App. 3a; 843 F.2d 547; *National Railroad Passenger Corp. v. The Horn & Hardart Co.*, L and T Index Nos. 36876/85, 36877/85, 36878/85 (N.Y. Civ. Ct., part 52) (consolidated). Horn & Hardart subsequently agreed to the entry in the New York courts of an order of possession; it ultimately vacated the premises on August 5, 1985. Pet. App. 3a; 843 F.2d 547. Concurrently in August 1985, Amtrak paid Horn & Hardart \$180,000 in compensation for the early termination in accordance with the cancellation-premium clause. *Id.*

² The Court of Appeals' decision was rendered on June 17, 1986. The clerk of the District Court received a certified copy of the judgment on September 5, 1986.

to Dismiss, enforcing the lease terms and rejecting Horn & Hardart's arguments that Amtrak was precluded by the prior proceedings in the case from obtaining any relief on its claims under the leases.

On appeal lodged by Horn & Hardart, the Court of Appeals agreed that Horn & Hardart's arguments would not allow it to "escape its contractual obligations." Pet. App. 10a; 843 F.2d 550. The Court of Appeals held that the District Court never lost jurisdiction over claims based on the lease provisions regarding liquidated damages and costs and that Section 2202 provided a procedural mechanism through which to make an award. The court also concluded that the District Court's award under Section 2202 was properly based on its prior ruling since the leases "specified that a valid notice of termination was the only factual and legal predicate necessary for recovery of liquidated damages and costs." Pet. App. 6a; 843 F.2d 549. The Court of Appeals then held that the normal rules of claim preclusion—enunciated in *Restatement (Second) of Judgments* §§ 22 and 33 and applied consistently by the federal courts—do not bar Amtrak's claims here. Pet. App. 8a; 843 F.2d 549-50. On the merits, the Court of Appeals agreed with the District Court that the holdover liquidated-damages clauses and the cost-on-default clauses in the leases were applicable and enforceable under District of Columbia law. Pet. App. 9a-10a; 843 F.2d 550.

Horn & Hardart's Petition seeks this Court's review of the Court of Appeals' affirmance of the District Court's award of further relief.

REASONS FOR DENYING THE WRIT

The issues posed by Horn & Hardart were correctly decided by the District Court and Court of Appeals and there are no special circumstances which suggest that the issues are appropriate subjects for this Court's plenary consideration.

Section 2202 of Title 28 U.S.C. provides that a federal district court with appropriate subject matter jurisdiction

possesses statutory authority to grant to a party—whether a plaintiff or defendant—prevailing on a final declaratory judgment “[f]urther necessary or proper relief based on [the] declaratory judgment.” Such further relief is a subsequent corollary to the declaratory judgment; it need not have been sought, pleaded, or proven prior to entry of the declaratory judgment. *See Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.*, 255 F.2d 518, 522 (2d Cir. 1958), *cert. denied*, 358 U.S. 831 (1958). The instant action is supported squarely by the terms of the statute and by governing case law. Amtrak’s entitlement to contractual liquidated-damages and costs-on-default was based on a factual and legal predicate that was conclusively determined in the final declaratory order of the District Court—that Amtrak properly terminated its leases with Horn & Hardart.

Both the District Court and Court of Appeals recognized that Horn & Hardart has completely misstated the jurisdictional significance of an appeal as to matters not appealed. The first appeal of the declaratory judgment did not affect the District Court’s power to entertain subsequent proceedings “based on” that judgment because Section 2202 “clearly anticipate[s] ancillary or subsequent coercion to make an original declaratory judgment effective,” as the Court of Appeals observed. *Pet. App. 4a*; 843 F.2d 518. Similarly, it is Horn & Hardart, not Amtrak, which seeks to carve out exceptions to the doctrine of *res judicata* in order to bar Amtrak’s claims. Both the District Court and the Court of Appeals agreed that there is no support in the statute or case law for any bar to the further relief that Amtrak was granted enforcing lease terms. Accordingly, there is no reason for this Court to grant the petition.

I.—The District Court Properly Exercised Jurisdiction

In upholding the District Court’s exercise of jurisdiction over Amtrak’s motion for further relief, the Court of Appeals acted in accord with long-established federal

law. The prior declaratory judgment in Amtrak's favor established the basis for further relief under Section 2202. The appeal of that judgment in no way affected adversely the District Court's jurisdiction to grant further relief. Instead, it confirmed the very judgment that established the foundation for the further relief.

The subject matter jurisdiction of the District Court properly was invoked by Horn & Hardart's complaint under 28 U.S.C. § 1332(a)(1) based upon diversity of citizenship.³ Diversity of citizenship continued through the pendency of this case in the District Court, and its subject matter jurisdiction likewise continued.

The jurisdictional doctrine which Horn & Hardart mistakenly seeks to invoke provides that during the pendency of an appeal, a federal district court is divested "of its control over *those aspects* of the case *involved in the appeal.*" *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam) (emphasis added). Such divestiture operates with a determinate scope both as to subject matter and time. Under *Griggs*, the District Court was barred from acting only with respect to "those aspects of the case involved in the appeal," *id.*, and then only during the pendency of the appeal.⁴ As this Court noted in *Griggs, id.*, this rule is a prudential

³ Horn & Hardart is a Nevada corporation with its principal place of business in Las Vegas. Pet. App. 2a; 843 F.2d 547. Amtrak is a citizen of the District of Columbia for the purpose of determining diversity jurisdiction. 45 U.S.C. § 546(m). Those circumstances have remained unchanged since the complaint was filed.

⁴ Following the first appeal in this case, the Court of Appeals' affirmance became the law of the case, precluding the District Court from reconsidering and revising any issue resolved by the Court of Appeals. See *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304 (1948), cited in the Petition at 13 n.4. As discussed *infra*, however, in the initial proceedings the District Court and the Court of Appeals had addressed only the question of the propriety of the notice of termination, not the further question of entitlement to liquidated damages and costs.

doctrine intended to avoid the concurrent exercise of jurisdiction by two courts over the same subject matter. It does not prescribe or govern the powers of a district court following an appeal or concerning matters not involved in the appeal.⁵

Amtrak's motion for further relief was filed after the Court of Appeals affirmed the declaratory judgment and relied on that affirmance to raise consequent matters that were not involved in the appeal. The matter initially declared by the District Court was limited specifically and solely to a "ruling on Amtrak's right to terminate the leases in question for corporate purposes." Pet. App. 58a n.6. On appeal of the declaratory judgment, the issue was similarly limited. As the Court of Appeals stated, the appeal was "taken from the District Court's grant of summary judgment in favor of [Amtrak]," and "[t]he issue presented [was] whether the trial court erred in its interpretation of *termination provisions* contained in the 1980 leases between Amtrak . . . and [Horn & Hardart]." Pet. App. 37a-38a; 793 F.2d at 356 (emphasis added). The *Griggs* rule is simply inapposite.⁶

⁵ The rule that a trial court is bound to follow the mandate of an appellate court is an aspect of the "law of the case" doctrine, whereby trial courts are bound by determinations made by appellate courts unless the appellate court's mandate explicitly leaves open a question which has been addressed. See, e.g., *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 177-78 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968). The doctrine does not strip a district court of "subject matter" jurisdiction; it simply forecloses inquiry into matters already decided. New matters, over which "subject matter" jurisdiction continues, can be considered. See, e.g., *Quern v. Jordan*, 440 U.S. 332, 346 n.18 (1979) (doctrine of law of the case comes into play only with aspect to issues previously determined; lower court is free to decide matters left open by mandate of superior court); *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 950 (3d Cir. 1985) ("A trial court is . . . free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not settled by the decision.").

⁶ Illustrative is *Henry v. Farmer City State Bank*, 808 F.2d 1228 (7th Cir. 1986), relied upon by Horn & Hardart in its Petition at

Horn & Hardart nevertheless persists in urging an erroneous and materially misleading position regarding the effect of an appeal on the jurisdiction of the district court. Following disposition of an appeal, and, in limited instances, even during pendency of an appeal, a district court may retain authority to exercise jurisdiction over certain matters where that authority is provided by statute, by express reservation in the judgment or mandate, or when the matters are collateral to or independent of those on appeal. See, e.g., *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168-69 (1939); *Overnite Transportation Co. v. Chicago Industrial Tire Co.*, 697 F.2d 789, 792 (7th Cir. 1983).

In this case, Section 2202 of the Declaratory Judgment Act constitutes express statutory authority for the district court's retention of jurisdiction with respect to the matters presented in the motion for further relief.⁷ Subject matter jurisdiction exists in this case under 28

11. In *Henry*, the Seventh Circuit affirmed the dismissal of a complaint but nonetheless reversed the entry of an injunction against the plaintiff's continued prosecution of a parallel suit in state court. Following *Griggs*, the court held that the district court lacked jurisdiction over the defendants' motion for the injunction because a notice of appeal had been filed. *Id.* at 1240. The Seventh Circuit continued, however, that "the defendants may refile their motion for injunction with the district court, which will again have jurisdiction over the case after our decision is final," *id.* at 1240 n.8, even though the final decision was a dismissal of the plaintiff's claims, as here.

⁷ Other avenues to relief could have been pursued by Amtrak. A more cumbersome and less efficient procedural option would have been to file a separate suit for further relief based on the prior judgment. Correlatively, Amtrak could have responded initially to Horn & Hardart's complaint by answering and raising counterclaims based upon the lease terms. See *Kyle Engineering Co. v. Kleppe*, 600 F.2d 226, 232 (9th Cir. 1979); *National Research Bureau, Inc. v. Bartholomew*, 482 F.2d 386, 388-89 (3d Cir. 1973) (per curiam); *Switzer Brothers, Inc. v. Chicago Cardboard Co.*, 252 F.2d 407, 410 (7th Cir. 1958). Federal diversity jurisdiction would exist in respect of each of these options.

U.S.C. § 1332(a)(1), and should not be confused with the authority provided by the Declaratory Judgment Act for the federal courts to grant an enlarged range of remedies. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240 (1937). See also *Windmoller v. Laquerre*, 284 F. Supp. 563, 564 (D.D.C. 1968). In that context, Section 2202 established a mechanism whereby all aspects of an action brought before a district court on a complaint for declaratory relief could be resolved in the same forum.

The intervening appeal by Horn & Hardart does not diminish the district court's explicit statutory authority for further relief set out in 28 U.S.C. §§ 2201 and 2202, nor does it eliminate the basis for diversity jurisdiction with respect to matters not involved in the appeal. See *McNally v. American States Ins. Co.*, 339 F.2d 186, 187 (6th Cir. 1964) (per curiam) (plaintiff properly sought further relief after prior declaratory judgment affirmed by appellate court). See also, e.g., *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 575 (9th Cir. 1980) (dictum) (district court has inherent power and is empowered by the Declaratory Judgment Act to grant supplemental relief after appeal is decided). Horn & Hardart is thus wrong to suggest that the Court of Appeals permitted the Declaratory Judgment Act to "alter the jurisdiction of the federal courts." Petition at 13. The prior disposition of the claim for declaratory relief poses no jurisdictional bar to consideration on the merits of Amtrak's claim for further relief based on that judgment. Indeed, Section 2202 explicitly makes the declaratory judgment the basis of, not a bar to, further relief. As the Court of Appeals recognized, to find such a bar in the declaratory judgment context "would allow the party against whom a declaratory judgment is rendered to nullify her adversary's right to § 2202 relief merely by lodging an appeal." Pet. App. 5a; 843 F.2d 548.

II. Relief Was Properly Granted Under 28 U.S.C. § 2202

Under Section 2202, a district court is authorized, after reasonable notice and a hearing, to order “[f]urther necessary or proper relief based on a declaratory judgment or decree” entered under Section 2201, and may order the relief “against *any* adverse party whose rights have been determined” by the prior judgment. 28 U.S.C. § 2202 (emphasis added). The District Court faithfully followed the dictates of the Declaratory Judgment Act and concluded that its prior declaratory judgment in Amtrak’s favor was an affirmative basis for further relief. The District Court found Horn & Hardart’s liability for holdover-liquidated-damages and cost-on-default to flow directly from its prior declaration that the leases were properly terminated. Pet. App. 19a; 659 F. Supp. 1262.

In affirming the District Court, the Court of Appeals was convinced that “Amtrak’s request for further relief in the form of triple rent and attorney’s fees follows absolutely from, and is based on, the District Court’s decision in Horn & Hardart I confirming Amtrak’s right to terminate the leasehold.” Pet. App. 6a; 843 F.2d 548. In addition, it found that “[f]urther relief is certainly proper in this case because the leasehold arrangement between Amtrak and Horn & Hardart specified that a valid notice of termination was the only factual and legal predicate necessary for recovery of liquidated damages and costs.” Pet. App. 6a; 843 F.2d 549.

Rejecting Horn & Hardart’s argument, the Court of Appeals found that the plain language of the Declaratory Judgment Act does not require that the further relief based on the judgment “be ‘necessary’ to effectuate the lease termination ruling,” but only that it be proper. *Id.* The language of Section 2202 has been similarly applied by the courts and commended by the commentators.⁸

⁸ See, e.g., *Besler v. U.S. Department of Agriculture*, 639 F.2d 453, 454-55 (8th Cir. 1981) (per curiam) (where government pre-

As both the Court of Appeals and the District Court explicitly recognized, this case is on all fours with *Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.*, 255 F.2d 518 (2d Cir.), cert. denied, 358 U.S. 831 (1958), where a plaintiff who prevailed in a declaratory judgment action regarding ownership of copyrights was subsequently allowed to seek further relief based on the separate but related claims for infringement and an accounting. See Pet. App. 6a; 843 F.2d at 548; Pet. App. 18a-19a; 659 F. Supp. at 1262.⁹ As the

vailed as defendant in prior declaratory action aimed at preventing it from recovering payments improperly made to ranchers, district court erred in failing to grant government's later motion for further relief seeking money judgments against the original plaintiffs); *Sakcezzie v. Utah State Indian Affairs Comm'n*, 215 F. Supp. 12, 21-22 (D. Utah 1963) (grant of request for further relief under Section 2202, including attorney's fees and costs for litigating the original declaratory action more than two years before and for fees and costs for pursuing the supplemental relief, is "clearly within the power and duty of the court"); E. Borchard, *Declaratory Judgments* 438-41 (2d ed. 1941). See also *Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus. A declaratory judgment can then be used as a predicate for further relief" (citations omitted)); *Alexander & Alexander, Inc. v. Van Impe*, 787 F.2d 163, 166 (3d Cir. 1986) ("The prevailing party in a declaratory judgment action subsequently may seek further relief; such 'further relief' can include damages," (emphasis in original; citation omitted)); *McCann v. Kerner*, 436 F.2d 1342, 1344 (7th Cir. 1971) (per curiam) (Section 2202 "contemplates that subsequent to the issuance of a declaratory judgment," a court may grant further relief).

⁹ Horn & Hardart suggests that *Marks Music* is distinguishable on the grounds that further relief in that case was sought in the original complaint, Petition at 21 n.14, but carefully ignores the fact that the *Marks Music* court explicitly rejected the argument that a failure to allege infringement and damages in the original complaint would prevent such further relief:

[T]his argument is specious. If plaintiff had proved infringement on the trial it would have been entitled to damages under

Second Circuit concluded, Section 2202 “authorizes further or new relief based on the declaratory judgment, and any additional facts which might be necessary to support such relief can be proved on the hearing provided in the section or in an ancillary proceeding if that is necessary.” 255 F.2d at 522 (citation omitted). Just as the declaratory judgment that Marks Music owned the copyrights established its right to seek damages for infringement, the declaratory judgment that Amtrak had lawfully exercised its right to terminate the leases on ninety days’ notice established its entitlement to liquidated damages and costs for Horn & Hardart’s holding over beyond the ninety days.¹⁰

Despite the plain language of the statute and the consistent precedent, Horn & Hardart again argues that the further relief provision is “limited to further relief to effectuate the underlying declaratory judgment.” Petition at 22. Although Horn & Hardart has cited a num-

Fed. R. Civ. Proc., rule 54(c); but under the declaratory judgment statute it was not compelled to take this course.

255 F.2d at 522.

¹⁰ Horn & Hardart is thus wrong to suggest that Amtrak’s right to further relief was any less established by the declaratory judgment here than was the plaintiff’s in *Marks Music*. Petition at 21 n.14. For the same reason, it is beside the point that “Horn & Hardart vigorously disputes Amtrak’s entitlement on the merits to the relief it seeks.” *Id.* at 20. Horn & Hardart lost on the merits in both the District Court and the Court of Appeals and has not sought review of the merits in this Court.

Similarly, Horn & Hardart wrongly asserts that “the final judgment confirming Amtrak’s right to the premises was already fully implemented, since Horn & Hardart had vacated the premises.” *Id.* at 12. *See id.* at 20. Horn & Hardart did not vacate until more than five months after the leases’ terms ended, and, as both the District Court and Court of Appeals held, Amtrak is entitled to damages and costs resulting from the holdover. Horn & Hardart has not challenged that holding.

ber of cases in which further relief was found necessary to effectuate the prior judgment, Petition at 19-20 & n.13, there is no suggestion in any of those cases that a court may not grant further relief that is proper based on the prior judgment. Horn & Hardart has not cited a single federal precedent which construes Section 2202 to authorize only relief which is necessary and not relief that is proper but not necessary.¹¹ There is good reason for this failure, since such a reading would elide the word "proper" from the statute. Nor is Horn & Hardart's attempt to conjure up a conflict in the reported decisions advanced by its citation to non-binding state court decisions under the Uniform Declaratory Judgment Act. The state cases do not support its position. The principal such decision on which Horn & Hardart relies, *Oklahoma Alcoholic Beverage Control Bd. v. Central Liquor Co.*, 421 P.2d 244 (Okla. 1966), is entirely inapposite. The case involved a declaratory judgment that the Board's "minimum price regulation" was void. A second action, brought over two years later, involved the authority of the Board—under an entirely different statute—to regulate price discounts. The second determination was in no way predicated on the first, and the Oklahoma court treated the plaintiff's second suit as constituting a second cause of action rather than a request for further relief based on the prior declaratory judgment. *Id.* at 247.

When Horn & Hardart complains that in following the plain language of Section 2202, the Court of Appeals and District Court issued "an invitation deliberately to

¹¹ The cases Horn & Hardart cites are contrary to the proposition it seeks to establish. See *Doe v. Gallinot*, 687 F.2d 1017, 1025 (9th Cir. 1981) (court may order further necessary or proper relief); *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 575 (9th Cir. 1980) (Section 2202 authorizes "supplemental relief"); *Teas v. Twentieth Century-Fox Film Corp.*, 413 F.2d 1263, 1267 (5th Cir. 1969) (Section 2202 "authorizes necessary or proper relief").

partition a case," Petition at 23, it only exhibits its failure to appreciate the remedial and procedural changes wrought by adoption of the Declaratory Judgment Act. The Act intentionally allows a greater measure of claim splitting than in other types of cases. The structure of the Act explicitly contemplates, and the case law confirms, that a plaintiff may initially seek solely a declaratory judgment and then, if necessary or proper, subsequently follow up with claims for damages or an injunction that flow from the prior declaration. See, *e.g.*, Judge Parker's elucidation of the purpose of the Act and of its use as an additional remedy in two leading cases decided on the same day shortly after its enactment. *Stephenson v. Equitable Life Assur. Soc'y*, 92 F.2d 406, 409 (4th Cir. 1937); *Aetna Casualty & Surety Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937). To narrow the scope of the Act as Horn & Hardart urges would not only conflict with the plain language of the Act, but would also unnecessarily limit the savings of judicial resources that the Act was specifically intended to provide. See H. Rep. 1264, 73d Cong. 2d Sess. 2 (1934).¹²

III. The Doctrine Of Res Judicata Does Not Bar Amtrak's Claims

Application of the traditional doctrine of res judicata does not bar Amtrak's claims but rather confirms that the District Court properly exercised jurisdiction under Sec-

¹² In an effort to spark the interest of the Court in the Petition, Horn & Hardart refers for the first time to "serious due process" concerns it alleges are raised by Section 2202's "reasonable notice and hearing" procedure for the grant of further necessary or proper relief. Petition at 23. The concerns are specious; Horn & Hardart does not (and could not) claim that it did not have ample, let alone constitutionally adequate, notice of Amtrak's claims. It had, and actually invoked, every opportunity to defend against them—at each level of the federal judiciary.

tion 2202. No unique or novel theories are required or were employed by the Court of Appeals.¹³

In this action, Amtrak as defendant moved to dismiss or in the alternative for summary judgment on the declaratory claim before it filed or was required to file an answer.¹⁴ Consequently, by virtue of Fed. R. Civ. P. 13(a), Amtrak was not required to assert any counterclaims. As the Court of Appeals held, where, as here, "a defendant neither asserts, nor is required to assert, a counterclaim, Restatement (Second) of Judgments § 22 explains that the previously unlitigated issues will not later be estopped by the earlier action." Pet. App. 8a; 843 F.2d 549 (citation omitted). Horn & Hardart's analytical premise thus evaporates; it does not dispute this proposition—it simply ignores it.

The doctrines reflected by this fundamental portion of the *Restatement* have been readily applied by the federal courts. Generally, a defendant who is not required to bring a counterclaim under Fed. R. Civ. P. 13(a) is not precluded by any res judicata principles from prosecuting its own claims in a separate subsequent suit. See *County Fuel Co. v. Equitable Bank Corp.*, 832 F.2d 290, 292

¹³ Horn & Hardart misstates "the usual prerequisites for application of res judicata." Petition at 24. To facilitate the Court's review, relevant portions of the *Restatement (Second) of Judgments* are reproduced in an Appendix to this brief.

¹⁴ Thus Amtrak did not file a "pleading" within the meaning of Fed. R. Civ. P. 7(a). Rule 13(a) of the Federal Rules of Civil Procedure states, in pertinent part:

Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

(4th Cir. 1987).¹⁵ The courts of appeals and district courts have uniformly held that until a responsive pleading is required of a party, Rule 13(a) does not apply and the party thus need not raise its counterclaims in order to preserve the right to plead them subsequently or to bring them as claims in a subsequent action.¹⁶

¹⁵ The only exception to this rule is the situation where "[t]he relationship between the counterclaim and the plaintiff's claim is such that the successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action." *Restatement (Second) of Judgments* § 22 (2)(b). See *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1232 (7th Cir. 1986) (quoting § 22(2)(b)); *Rudell v. Comprehensive Accounting Corp.*, 802 F.2d 926, 928 (7th Cir. 1986) (citing § 22 (2)(b)), *cert. denied*, 107 S. Ct. 1351 (1987); *County of Cook v. Mideon Corp.*, 773 F.2d 892, 908 & n.10 (7th Cir. 1985) (quoting § 22(2)(b)); *Martino v. McDonald's System, Inc.*, 598 F.2d 1079, 1084-85 (7th Cir.) (where facts form basis of both defense and counterclaim, defendant's failure to allege does not preclude use of facts in subsequent proceeding against plaintiff; exception to rule is that counterclaim is barred where "its prosecution would nullify rights established by the prior action."), *cert. denied*, 444 U.S. 966 (1979).

¹⁶ See *United States v. Snider*, 779 F.2d 1151, 1157 (6th Cir. 1985); *Martino v. McDonald's System, Inc.*, 598 F.2d 1079, 1082 (7th Cir.), *cert. denied*, 444 U.S. 966 (1979); *Lawhorn v. Atlantic Refining Co.*, 299 F.2d 353, 356 (5th Cir. 1962); *Central States, Southeast & Southwest Areas Pension Fund v. Commercial Cartage Co.*, No. 86C 3268, slip op. (N.D. Ill. Apr. 24, 1987) (available on Westlaw); *United States v. Thompson*, 262 F. Supp. 340, 342-43 (S.D. Tex. 1966); *Potter v. Carvel Stores of New York, Inc.*, 203 F. Supp. 462, 464-65 (D. Md. 1962), *aff'd*, 314 F.2d 45 (4th Cir. 1963). In *National Union Fire Ins. Co. of Pittsburgh, PA v. Jett*, 118 F.R.D. 336 (S.D.N.Y. 1988), the defendant had filed in an earlier action, as in this case, a motion to dismiss, or in the alternative for summary judgment prior to being required to file its answer. The court granted summary judgment, or in the alternative the motion to dismiss. The defendant later sought to pursue its counterclaims, and the court held that where no responsive pleading was required in the prior action, the defendant was not barred from bringing the new action. *Id.* at 337-38.

In the instant case Amtrak never filed a responsive pleading because Horn & Hardart's claim received a summary disposition before any answer by Amtrak was required.¹⁷ Since Amtrak was not required to file an answer, Rule 13(a) does not apply, and under longstanding principles of res judicata as explicated in Section 22 of the *Restatement (Second)*, Amtrak was not precluded from seeking further relief.

Even if Amtrak had been plaintiff, not defendant, res judicata would not bar the claims for liquidated damages and costs. In the case of a plaintiff who brings an action seeking only declaratory relief, the *Restatement (Second)* provides that

[t]he effect of such a declaration, under this approach, is not to merge a claim in the judgment or to bar it. Accordingly, regardless of outcome, the plaintiff or defendant may pursue further declaratory or injunctive relief in a subsequent action . . . includ[ing] damages which had accrued at the time the declaratory relief was sought

Restatement (Second) of Judgments § 33 comment c (1982). As a result, the Court of Appeals did not need to consider whether Section 2202 "might actually enlarge the declaratory judgment exception to claim preclusion to permit a supplemental action even where the original action involved more than declaratory relief." Pet. App. 8a n.6; 843 F.2d 549 n.6.¹⁸ Horn & Hardart is wrong to

¹⁷ This situation is entirely within the contemplation of Rules 12(a) and 12(b)(6) that a motion to dismiss for failure to state a claim tolls the requirement of filing an answer, even if it is treated as a summary judgment motion because matters outside the complaint are considered.

¹⁸ The issue was raised because the District Court missed the mark in stating that "if applicable, traditional res judicata bars Amtrak's petition for further relief." Pet. App. 24a; 659 F. Supp. 1264. Traditional res judicata principles do *not* bar the defendant's non-compulsory counterclaims except where their prosecution would

insist, therefore, that “[t]he court below extended the declaratory judgment exception.” Petition at 25.

Horn & Hardart’s arguments for preclusion contravene fundamental principles governing the effects of a former adjudication. In considering the non-compulsory counterclaims of a defendant involuntarily brought into court to respond to a complaint by an adverse party, there is no basis to apply preclusion rules with the force applicable to the claims of a plaintiff which have been fully adjudicated on the merits. Under the *Restatement (Second) of Judgments* and consistent judicial precedent, defendants should not normally be required to assert their non-compulsory counterclaims to plaintiffs’ claims at the time and place of plaintiffs’ choosing.¹⁹

implicate the repose of the original judgment, as explained *supra*. The District Court’s citation to *Montana v. United States*, 440 U.S. 147 (1979), Pet. App. 23a; 659 F. Supp. at 1264, is inapposite because that case describes general res judicata principles, 440 U.S. at 153, in the context of the attempt by the privy of a non-prevailing plaintiff in a prior adjudication to avoid the collateral estoppel effect of the prior adjudication. Similarly, the treatise cited by the District Court, C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (1981), Pet. App. 23a, 659 F. Supp. at 1264, does not suggest that res judicata applies broadly to defendants with non-compulsory counterclaims. In fact, the authors state explicitly that “[f]ailure to advance a merely permissive counterclaim . . . ordinarily does not preclude a later action,” *id.* § 4414 at 109, except in the case of counterclaims that involve “direct attacks on the original judgment based on defenses or claims that could have been advanced in the first action,” *id.* at 110, or where the repose of the first judgment is otherwise threatened with “effective destruction in a later action by the former defendant,” *id.* at 111. The rule that emerges thus is fully congruent with that enunciated in *Restatement (Second) of Judgments* § 22.

¹⁹ See *Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc.*, 575 F.2d 530, 536 (5th Cir. 1978) (if defendant’s claims merged in unsuccessful declaratory action by plaintiff, impermissible result would be that plaintiff could extinguish defendant’s claims by suing for declaratory relief and voluntarily dismissing the suit with

Apocalyptically, Horn and Hardart has asserted over and over again before this Court, as it did before the District Court and the Court of Appeals, that a failure to preclude Amtrak's claims means that a court could never know whether its declaratory judgment would or would not finally settle and determine the controversy between the parties. This assertion is fallacious. Under the principles enunciated in *Restatement (Second) of Judgments* § 21, see App. 1a, a subsequent presentation of counterclaims by a prior defendant would implicate thereafter the full panoply of rules of issue and claim preclusion as to those claims.

The instant case provides a good example of the efficacy and efficiency of the preclusion rules set out in the *Restatement Second* and applied by federal courts. In this case, the District Court exercised its discretion—at Horn & Hardart's insistence—to hear Horn & Hardart's claim for declaratory, coercive, and monetary relief and found that claim to be invalid before any answer was filed, or required to be filed, by Amtrak. Thereafter, by way of a motion for further relief in the forum of the plaintiff's choice, Amtrak chose to raise its claims for holdover liquidated-damages and costs-on-default based on the prior judgment. Depending upon the outcome of this petition, the determination of these claims by the District Court will be a final adjudication. The entire matter has been handled in a careful and expeditious manner with minimal taxation of judicial—or litigants'—resources.

(prejudice); *Lawhorn v. Atlantic Refining Co.*, 299 F.2d 353, 357 (5th Cir. 1962); *National Union Fire*, 118 F.R.D. at 337-38; *Restatement (Second) of Judgments* § 22 comments a, b, d.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

CHARLES F. LETTOW *
MATTHEW D. SLATER
MICHAEL J. SUSSMAN
CLEARY, GOTTlieb,
STEEN & HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700

* Counsel of Record

Counsel for Respondent

August 8, 1988

APPENDIX

Restatement (Second) of Judgments § 18 (1982) provides:

§ 18. Judgment for Plaintiff—The General Rule of Merger

When a valid and final personal judgment is rendered in favor of the plaintiff:

(1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment; and

(2) In an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action.

Restatement (Second) of Judgment § 21 provides:

§ 21. Judgment for Defendant on His Counterclaim

(1) Where the defendant interposes a counterclaim on which judgment is rendered in his favor, the rules of merger are applicable to the claim stated in the counterclaim, except as stated in Subsection (2).

(2) Where judgment on a counterclaim is rendered in favor of the defendant, but he is unable to obtain full recovery in the action because of the inability of the court to render such a judgment and the unavailability of such devices as removal to another court or consolidation with another action in the same court, the defendant is not precluded from subsequently maintaining an action for the balance due on the claim stated in the counterclaim.

Restatement (Second) of Judgment § 22 (1982) provides:

§ 22. Effect of Failure to Interpose Counterclaim

(1) Where the defendant may interpose a claim as a counterclaim but he fails to do so, he is not thereby precluded from subsequently maintaining an action on that claim, except as stated in Subsection (2).

(2) A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, after the rendition of judgment in that action, from maintaining an action on the claim if:

(a) The counterclaim is required to be interposed by a compulsory counterclaim statute or rule of court, or

(b) The relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.

Comment d to Section 22 explains the application of these rules to a situation where, as here, the same facts constitute a defense to plaintiff's claim and a ground for counterclaim:

d. *Defense and counterclaim—Judgment for defendant; splitting claims.* Where the same facts constitute a defense to the plaintiff's claim and a ground for counterclaim, and the defendant sets up these facts as a defense but not as a counterclaim, and after litigation of the defense judgment is given for the defendant, the defendant is not precluded by the rule of merger from maintaining a subsequent action against the plaintiff based upon these facts. See Illustration 5. In the subsequent action, the

rules of issue preclusion (see §§ 27, 28) will apply to issues litigated and determined in the first action.

Illustration 5 to Section 22 is directly pertinent to the instant case.

5. A brings an action against B for the negligent driving of an automobile by B resulting in a collision with an automobile driven by A. B in his answer denies that he was negligent and alleges that the collision was due to A's negligence. After trial of these issues judgment is given for B. B is not precluded by the doctrine of merger from thereafter maintaining an action against A for the damage done to him by the collision.